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626530—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 640

SWANEE PAPER CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A10) is reported at 291 F. 2d 833. The initial decision of the hearing examiner and the decision of the Federal Trade Commission adopting the initial decision (Cir. A. 19a–48a) [1] are not yet officially reported.

JURISDICTION

The final decree of the court of appeals was entered on August 3, 1961. Because of material errors in the version set forth in the Appendix to the petition at pp. A16–A18, the actual decree is printed in the Appendix hereto, *infra*, pp. 11–12. By order of Mr. Justice Harlan, the time for filing a petition for a writ

[1] This brief will follow petitioner's use of "Cir. A." to refer to the Appendix for Petitioner in the court of appeals.

of certiorari was extended from November 1, 1961, to December 29, 1961. The petition was filed on December 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a cease-and-desist order issued by the Federal Trade Commission, which was modified by the reviewing court despite petitioner's failure to challenge its breadth before the agency, should be modified further.

STATUTE INVOLVED

Section 2(d) of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 13(d), is printed in the petition at p. 3.

STATEMENT

In August 1952, Douglas Leigh, Inc., the owner and operator of an illuminated advertising sign located on the roof of a building in the Times Square area of New York City, entered into an agreement with the Grand Union Company in which Grand Union agreed to pay Leigh a nominal sum of $50 and to secure the agreements of fifteen participating advertisers to pay Leigh $1,000 each for use of a particular panel of the sign. Grand Union in turn was given the right to use the other portions of the sign for its own advertising and to veto all advertising messages on any part of the sign. Later, Grand Union was also given a share of the monthly rentals. (Cir. A. 22a–26a.)

The participating advertisers, whose agreements Grand Union secured, were all enterprises whose products were sold in Grand Union stores (Cir. A.

31a–32a).[2] Petitioner, a manufacturer of paper products, entered into a contract to become one of Grand Union's participating advertisers (Cir. A. 24a). A schedule of in-store promotions of petitioner's products was also arranged with Grand Union to tie in with the use of the sign, although no separate payments were made by petitioner for these promotions (Cir. A. 34a, 44a).

In 1955, petitioner stated its intention not to renew its participation "because of pressure from other concerns," including customers of petitioner who were in competition with Grand Union. Following discussions with Leigh and Grand Union, however, petitioner renewed its participation. The renewal agreement differed from its earlier agreements with Leigh in that all references to Grand Union were omitted (Cir. A. 26a–31a). On December 31, 1956, after the Commission had begun its investigation of the practice, petitioner finally canceled its participation in the use of the sign (Cir. A. 32a, 46a).

The examiner found that the deletion from petitioner's renewed contract of references in the earlier contracts "which tended to identify the sign as a Grand Union sign and pointed up the cooperative nature of

[2] Petitioner's statement (Pet. 6) that "several users of the [sign] did not manufacture or sell products in any grocery store, including Grand Union," is misleading. The users to which petitioner refers were not participating advertisers who paid monthly rentals to Leigh under the arrangement worked out between Leigh and Grand Union, but were television stations and a newspaper to whom Grand Union traded a portion of its advertising time on the sign in exchange for time and space in these media (Cir. A. 33a–34a).

the arrangement" was "indicative of an intent to cover up * * *" (Cir. A. 42a). The examiner further found that "the idea of splitting the arrangement into two separate groups of contracts" came about because, if "a single contract [had] been entered into among all parties, the nature of the arrangement as a cooperative advertising venture * * * would have been revealed * * *" (Cir. A. 45a).

After full hearing, the examiner concluded that petitioner had violated Section 2(d) of the Clayton Act by making discriminatory payments to Grand Union over a period of years. Although he believed that petitioner's knowledge and intent were probably irrelevant to a determination that it had violated the statute (Cir. A. 39a–40a), the examiner expressly concluded that petitioner had in fact known that its actions benefited Grand Union at the expense of its other customers, and had intended to confer such benefits upon Grand Union (Cir. A. 40a–45a). The examiner proposed a cease-and-desist order (Cir. A. 47a), the scope of which petitioner did not challenge in its appeal to the Commission.

The Commission adopted the examiner's findings and conclusions as its own and issued the order in the form proposed by the examiner (Cir. A. 48a).

Petitioner then filed a petition for review in the court of appeals (Cir. A. 49a–52a), which for the first time raised an issue as to the breadth of the order. The court accepted the Commission's findings and agreed with the Commission that petitioner had violated Section 2(d) (Pet. App. A2–A9). It was of the view, however, that although petitioner "did not object to the order during the proceedings below," the court could

nevertheless consider the objection because it had been raised in the petition to review and because the 1959 Amendments to the Clayton Act had set up new enforcement procedures. The court held that "the order issued is not justified by the facts" and "should be limited to the particular practice found to violate the statute" (Pet. App. A9, 10).

The court required the Commission within ten days to submit a proposed decree "in conformity with the opinion" and allowed petitioner, if it disagreed, to submit its proposed decree (Pet. App. A10). Both the Commission (Pet. App. A11–A13) and petitioner (Pet. App. A14–A15) responded. The court adopted neither suggestion and formulated its own final decree modifying and, as modified, affirming the Commission's cease and desist order (App., *infra*, pp. 11–12). The pertinent part of the order is set out below. Those portions of the Commission's order deleted by the court are placed in brackets; those portions which the court added to the Commission's order are printed in italics; those portions of the Commission's order which were retained are set out in Roman type (compare Cir. A. 47a with App., *infra*, p. 12). The order directed Swanee, the petitioner, "in connection with the sale or offering for sale in commerce * * * of paper products," to cease and desist from—

> Paying or contracting to pay [to or for the benefit of any customer] anything of value *to any third person* as compensation or in consideration for any advertising[,] *or* promotional display[s or other] services or facilities *if such services or facilities are* furnished by or through [such] *any* customer *of Swanee* in con-

nection with the [handling, processing,] sale or offering for sale of [respondent's] *Swanee's* products, *and such compensation or consideration paid or contracted to be paid to said third person is used in whole or in part to provide benefits for said customer,* unless [such payment or consideration is] *the benefits thus derived by said customers are* made available on proportionately equal terms to all other customers *of Swanee* competing in the distribution of [such] *its* products.

ARGUMENT

Petitioner makes no challenge to the court's affirmance of the Commission's finding that Swanee had violated Section 2(d) of the Clayton Act by making discriminatory payments to Grand Union over a period of years. The sole question presented by the the petition is whether the court of appeals, in modifying the Commission's order by limiting its scope to the particular practice by which petitioner violated Section 2(d), erred in not still further limiting its scope to circumstances in which petitioner can be shown to have known that its payments to a third party would benefit a customer and that the services petitioner would receive in return would be in consideration of such benefit. This question presents no issue of general importance and involves no conflict between the circuits warranting review by this Court. The challenge is in any event not open to petitioner because of its failure to present the matter first to the Commission.

1. Since the Commission's order, as modified by the court of appeals, prohibited petitioner from paying a third party for advertising or display services

or facilities only where they are "furnished by or through" a customer of the petitioner in "connection with the sale or offering for sale" of petitioner's products (App., *infra*, p. 12), it is difficult to conceive of any situation falling within the prohibited course of conduct in which petitioner would not either actually know, or be in a position where it had good reason to know, that it was violating the decree. Moreover, since the court of appeals affirmed the Commission's conclusions that petitioner "knew or should have known that it was benefiting Grand Union" (Pet. App. A6) and that its deletion of all references to Grand Union in the 1955 renewal of its contract, shortly after it had complained of pressures from its other customers, "supports the [Commission's] view that Swanee was not totally unaware of the legal significance of the arrangement" (Pet. App. A7), the court certainly was not obligated to place upon the Commission the burden of proving petitioner's knowledge in any future proceedings arising out of petitioner's subsequent activities.

If knowledge were an essential element of a violation of Section 2(d)—which is doubtful [4]—and therefore of the decree, petitioner in any subsequent action would be free to show that it lacked actual or constructive knowledge of the nature of its customers' participation in the scheme. In view of the court of appeals' express statement that it intended to limit the order to "the particular practice found to violate the statute" (Pet. App. A10), the order undoubtedly would not be read "as denying * * * [petitioner] the benefit of statu-

[4] See *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F. 2d 439, 444 (C.A. 3), certiorari denied, 361 U.S. 923.

tory defenses or exceptions" (*Federal Trade Commission* v. *Henry Broch and Co.*, No. 74, this Term, decided January 15, 1962, slip. op., p. 7), including lack of knowledge if this be in fact a defense. See *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475–76; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 426. In the circumstances presented, however, the court of appeals clearly was not required to resolve the question in advance in favor of petitioner.

2. In any event, petitioner's failure to challenge the scope of the order before the Commission bars it from here contending that the order, despite the modifications made by the court of appeals, is still unduly broad. Since petitioner failed to raise any objection to the scope of the order on appeal to the Commission from the initial decision of the examiner, despite the express provision in the Commission's rules requiring it to do so (see 16 CFR (1960 ed.) 3.22), judicial modification of the order was foreclosed by the settled rule that issues not raised before an administrative agency are ordinarily not open before the reviewing court. See the Commission's brief in *Federal Trade Commission* v. *Henry Broch and Co., supra,* pp. 14–19, and cases there cited.

The court of appeals deemed the rule inapplicable and modified the order because the scope of the order was challenged in the petition to review and because the 1959 Amendments to the Clayton Act had set up new enforcement procedures. Compare *Federal Trade Commission* v. *Henry Broch and Co., supra,* slip op., pp. 5–3. We believe that the court erred in modifying the order because neither of its reasons overcomes the basic policy behind the rule that the agency should

have the initial opportunity to consider matters within its jurisdiction. And, as the dissenting Justices pointed out in the *Broch* case, *supra*, "When its attention is focused to the appropriateness of the scope of an order to restrain illegality, the Commission has shown responsible awareness of the difference in shaping its order to a situation like the one presented by this case, to wit: a specific, closely confined illegality as distinguished from a widespread illegal practice inimical to the public interest." Because we have not sought review of the court's determination, we cannot challenge the modifications of the Commission's order which the court has already made. We nevertheless believe that the rule may properly be invoked to preclude any further modifications of the scope of the order.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
RICHARD A. SOLOMON,
IRWIN A. SEIBEL,
Attorneys.

JAMES McI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
Federal Trade Commission.

JANUARY 1962.

APPENDIX

FINAL DECREE

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 26311

SWANEE PAPER CORPORATION, A CORPORATION, PETITIONER, *v.* FEDERAL TRADE COMMISSION, RESPONDENT

FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING, ORDER TO CEASE AND DESIST

Swanee Paper Corporation, a corporation, petitioner herein, having filed in this Court on May 31, 1960, a petition to review and set aside an order to cease and desist issued against it on March 22, 1960, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Swanee Paper Corporation, a corporation, Docket No. 6927;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on January 12, 1961, and this Court having rendered its decision on June 22, 1961, holding that the aforesaid order to cease and desist "should be limited to the particular practice found to violate the statute;"

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondent Swanee Paper Corporation, a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in connection with the sale or offering for sale in commerce (as "commerce" is defined in the Clayton Act) of paper products, do forthwith cease and desist from:

> Paying or contracting to pay anything of value to any third person as compensation or in consideration for any advertising or promotional display services or facilities if such services or facilities are furnished by or through any customer of Swanee in connection with the sale or offering for sale of Swanee's products, and such compensation or consideration paid or contracted to be paid to said third person is used in whole or in part to provide benefits for said customer, unless the benefits thus derived by said customers are made available on proportionately equal terms to all other customers of Swanee competing in the distribution of its products.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the order as thus modified be, and it hereby is, affirmed, and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety (90) days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist as hereby modified.

CHARLES E. CLARK,
by LPM

LEONARD P. MOORE,
United States Circuit Judges.

Dated: August 3, 1961.

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